APPEAL NO. 171149
FILED JUNE 28, 2017

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on March 21, 2017, in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issue by deciding that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by (Dr. D) on September 18, 2015, became final under Section 408.123 and 28 TEX. ADMIN. CODE

The appellant (claimant) appealed the hearing officer's determination arguing that Dr. D is not properly authorized pursuant to Rule 130.1(a) to provide certifications of MMI; that the first certification of MMI/IR by Dr. D was rescinded by the doctor and did not become final pursuant to Rule 130.12; and that Dr. D's certification did not become final because compelling medical evidence exists of a significant error made by Dr. D in applying the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides) and further that the claimant suffered from a mistaken diagnosis or previously undiagnosed condition which would allow the claimant's dispute of Dr. D's certification after the period described in Section 408.123(e). We note the claimant's first name was misspelled in the style of the hearing officer's Decision and Order.

The respondent (carrier) responded urging affirmance.

DECISION

Reversed and remanded.

The parties stipulated, in part, that on (date of injury), the claimant was the employee of AF Global Corp.,[1] that the claimant received a copy of Dr. D's September 18, 2015, certification of MMI/IR on September 29, 2015, and that Dr. D's September 18, 2015, certification of MMI/IR was not disputed within 90 days.

The hearing officer found that Dr. D's certification of MMI and assigned IR was provided to the claimant by verifiable means on September 29, 2015. Additionally, the hearing officer found that the claimant did not dispute Dr. D's certification of MMI and

[1] In her Finding of Fact No. 1.B., the hearing officer mistakenly states that the parties stipulated that the claimant was the employee of (employer) on (date of injury).

assigned IR within 90 days after the date the rating was provided. These facts are undisputed by the parties.

No witnesses testified at the CCH; however, it is undisputed that the claimant injured his low back on (date of injury), while lifting a spool of welding wire; that he began treating with Dr. D on (date of injury), and was diagnosed with a lumbar sprain/strain; that Dr. D certified on September 18, 2015, that the claimant attained MMI on that date with no permanent impairment as a result of the compensable injury; and that, in a report dated September 30, 2015, Dr. D indicated the claimant's back pain had increased suggestive of a possible herniated disc and, for such reason, the claimant was being referred for MRI testing and Dr. D now expected MMI on October 30, 2015. In evidence is an MRI report dated October 7, 2015, which reflects findings at the L5-S1 level of disc extrusion, endplate changes and bilateral facet arthropathy producing severe stenosis and impingement of the L5 and S1 nerve roots for which surgical intervention has been recommended.

Section 408.123(e) provides that except as otherwise provided by this section, an employee's first valid certification of MMI and the first valid assignment of an IR is final if the certification or assignment is not disputed before the 91st day after the date written notification of the certification or assignment is provided to the employee and the carrier by verifiable means. Rule 130.12(b) provides, in part, that the first MMI/IR certification must be disputed within 90 days of delivery of written notice through verifiable means: that the notice must contain a copy of a valid Report of Medical Evaluation (DWC-69), as described in Rule 130.12(c); and that the 90-day period begins on the day after the written notice is delivered to the party wishing to dispute a certification of MMI or an IR assignment, or both.

Section 408.123 further provides:

> (f) An employee's first certification of [MMI] or assignment of an [IR] may be disputed after the period described by Subsection (e) if:
>
> (1) compelling medical evidence exists of:
>
> (A) a significant error by the certifying doctor in applying the appropriate American Medical Association guidelines or in calculating the [IR];
>
> (B) a clearly mistaken diagnosis or a previously undiagnosed medical condition; or

(C) improper or inadequate treatment of the injury before the date of the certification or assignment that would render the certification or assignment invalid.

In the Discussion section of her Decision and Order the hearing officer addressed the exception contained in Section 408.123(f)(1)(B); however, she stated as follows:

> [The] [c]laimant also argues a misdiagnosis by [Dr. M], designated doctor, as he considered a rotator cuff tear, and did not indicate in his analysis that the condition was a partial rotator cuff tear. However, the evidence offered did not persuasively demonstrate that compelling medical evidence of any of the exceptions to 90-day finality found in [Section] 408.123(f) exist in this case.

There are no records in evidence from a Dr. M nor is there any evidence that the claimant claims to have sustained a rotator cuff tear or partial rotator cuff tear as part of the compensable injury on (date of injury). We accordingly reverse the decision of the hearing officer that the first certification of MMI and IR assigned by Dr. D on September 18, 2015, became final pursuant to Section 408.123 and Rule 130.12 and remand the issue of finality of the first certification to the hearing officer to consider the evidence properly admitted and to make findings of fact, conclusions of law and a determination concerning whether the first certification of MMI and assignment of no permanent impairment by Dr. D on September 18, 2015, became final under Section 408.123 and Rule 130.12.

REMAND INSTRUCTIONS

On remand the hearing officer is to consider all of the evidence properly admitted, make findings of fact and render conclusions of law and a decision regarding whether the first certification of MMI and assignment of no permanent impairment by Dr. D on September 18, 2015, became final under Section 408.123 and Rule 130.12.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Department of Insurance, Division of Workers' Compensation pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas

Government Code in the computation of the 15-day appeal and response periods. *See* Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **AMERICAN ZURICH INSURANCE COMPANY** and the name and address of its registered agent for service of process is [2]

CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3232.

K. Eugene Kraft
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge

[2] We note the hearing officer's Decision and Order recites an incorrect name and address for the insurance carrier's registered agent for service. The insurance carrier information sheet in evidence contains the name and address listed above.